Supreme Court, U.S.
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No. 02-1665

In The Supreme Court of the United States

JOHN A. GAMBONE, SR. and ANTHONY GAMBONE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioners submit this reply to underscore government's failure to address meaningfully the nullification of Section 7204's preclusion effected by the holding of the Third Circuit. Other points raised by the government are addressed fully in the original petition and will not be reiterated here.

The government merely proclaims that allowing the jury to consider false W-2 evidence "does not nullify" the preclusive effect of Section 7204. (Gov't Br. p. 9). Yet, it fails to explain why this is so or to otherwise deal with petitioners' argument in this regard. The government's lack of explanation, however, does nothing to cure the fundamental flaw in its assertion. Simply put, the government's position creates a legal conundrum from which the conclusion that a nullification has been worked is inescapable.

It is first necessary to consider what the government does not contest. There is no dispute that, absent Section 7204's "in lieu of" clause, the willful creation of a false tax document for use in preparing another's return would, by itself, be sufficient to sustain a conviction under Section 7206(2).[1] It is this fact, however, that creates the fundamental problem. If the jury is permitted to consider the false W-2 evidence, then it can convict under section 7206(2) irrespective of its conclusion as to the significance,

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[1] The government also does not dispute that the "in lieu of" language when properly applied has a preclusive effect on all sections of the Internal Revenue Code, including Section 7206(2).

or lack thereof, of any additional evidence. This necessarily effects a nullification of the "in lieu of" clause.

In an effort to solve this problem, both the district court and court of appeals struggled mightily to define an additional element that could convert a Section 7204 case into a Section 7206(2) case. Their solution, however, was a concept both rife with ambiguity wholly inappropriate to define an essential element of a criminal offense, and one which does nothing to solve the problem of nullification. The ostensible solution offered below requires the defendant to take no action other than providing a false W-2 or, put another way, to "eschew ancillary conduct." (Pet. 15a, 16a n.9). Instead, there must be "something else" as the district court instructed (*id.* at 36a), or "any other evidence suggesting" intent as the court of appeals phrases it. (*id.* at 15a) Neither court was able to define this further. The Third Circuit did no better than offer further vagaries such as "something more" that "at least encourages a false return." (*id.* at 12a, 16a) The district court had such difficulty with the concept that while, with one hand, it told the jury they needed to find "something else," with the other it retracted the requirement by including a false W-2 within the very definition of "something else." (*id.* at 36a)

However one attempts to define the requisite additional evidence, the concept simply does not work. If the jury is allowed to consider the false W-2 in deliberating on Section 7206(2), the "something else" becomes meaningless. The false W-2 evidence alone establishes the intent to cause the employee to file a false return. That being so, *any* additional evidence will *always* be interpreted to suggest an intent to encourage. Plainly, if the employee income is deliberately omitted from the W-2, it is not meant to go on the tax return – that is what common

sense dictates, that is what juries will find and that is how they will interpret any other evidence. Only an exercise in pure legal fiction allows a contrary conclusion.

The so-called "something else" is also rendered meaningless by the fact that, by definition, a false W-2 will never exist in a vacuum in a viable Section 7204 case. There will always be some additional action by the defendant which causes the creation of, or otherwise supports, the false W-2. Such evidence would be required to establish willfulness, as opposed to mistake or negligence, in a Section 7204 case. Thus, allowing such ancillary conduct to meet the "something more" standard would convert every Section 7204 case into a Section 7206(2) conviction.

It is this conundrum that makes plain the deep substantive rift between the Sixth Circuit and the Third. Any of the ancillary evidence encountered in *Hughes* – the false expense vouchers, the false employee records, the false W-3 or the false CM-2 forms – would be more than enough to satisfy the Third Circuit's test of "something else." Applying the Third Circuit's test to the facts in *Hughes* would have resulted in affirmance. The Sixth Circuit reversed, however, because it applied the standard proposed by petitioners here. The additional evidence of "counseling" must be sufficient in and of itself to support conviction. 899 F.2d at 1500-1501. As the district court in *Hughes* found, in reasoning adopted by the Sixth Circuit: "In a sense, the false W-2 form is irrelevant." There must be "other actions violative of § 7206(2)" from which the jury can conclude beyond a reasonable doubt that the defendant "*additionally* counseled" the taxpayer to understate their income. 1987 WL 33086 *4. Thus, to implement the preclusive effect of Section 7204, as the Sixth Circuit clearly held in *Hughes*, the additional evidence must be

sufficient standing alone to support a section 7206(2) counseling conviction without reference to the false W-2s.

Respectfully submitted,

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